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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 836

CHEMICAL CORPORATION OF AMERICA,
Petitioner,

vs.

ANHEUSER-BUSCH, INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Chief Justice of the United States and The Associate Justices of The Supreme Court of the United States:

This cause of action is a typical case of trademark infringement and unfair competition, depending for decision entirely upon its own facts, and since two courts below have unanimously resolved the disputed questions of fact and the applicable law in favor of Respondent, the Petition for Writ of Certiorari should be denied.

The questions proposed by Petitioner are not those which this Court should consider, for the following reasons:

1. The case is only an ordinary trademark and unfair competition action involving entirely questions of fact, and since there were concurrent Findings of Fact by the courts below, the case should not be reviewed.

2. As to the application of law, there is no conflict between the decisions of the courts below and any decisions of this Court or any other Courts of any other Circuit.

3. This case does not involve either the validity or the interpretation of the Lanham Act.

4. There are no special and important reasons why the writ should be granted.

5. The petition does not conform with Rule 23 of this Court, especially paragraph No. 4.

Summary of Factual Background.

In view of the fact that there is no clear presentation of the factual background presented in Petitioner's brief*, and since the issues were clearly understood and defined by the courts below, we quote from the Court of Appeals' decision, which, in turn, adopted the District Court's Findings of Fact with respect to the factual background, as follows:

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* The summary of pleadings and evidence included as appendices to Petitioner's brief (pp. 1a-34a) is rampant with error and self-serving statements. However, Respondent does not think it to be in the interests of this Court to burden the prolix Petition by an addendum which would be equally long, since the factual background quoted by the Court of Appeals above is sufficient for purposes of this Court to deny the writ.

"The record on appeal fully warrants findings by the trial court of the following facts quoted from the court's 'Findings of Fact:'

> "Plaintiff is engaged in the manufacture and sale of various food and beverage products. The most notable of its products is Budweiser beer. This beer is also advertised and marketed under the name of 'Bud' as well as Budweiser beer. Both of these names have been registered as trademarks in accordance with the provisions of the Lanham Act, 15 U.S.C. Section 1051, *et seq.* In October, 1960, after this suit was commenced, plaintiff registered 'Where there's life . . . there's Bud' and 'Where there's life . . . there's Budweiser' on the supplemental register under the provisions of the Lanham Act.
>
> "In 1933 plaintiff began using the slogan 'Where there's life . . . there's Budweiser' in its advertising. From 1933 to 1956 plaintiff used the slogan infrequently. In 1956 plaintiff undertook sales campaigns employing the slogans and trademarks 'Where there's life . . . there's Bud'. Plaintiff, having found that the slogans were effective in successfully marketing its product, spent in excess of $40,000,000.00 in advertising which contained the two slogans. Plaintiff advertised Budweiser beer with the slogans and trademark on radio stations, television, national billboards, newspapers and national circulated magazines. The evidence shows that plaintiff's sales have increased since 1956 and a great portion of the increase is attributable to the success of plaintiff's advertising.
>
> "The slogans were not affixed directly on the bottles or upon the beer cans, nor upon the labels on the bottles and cans. Some of the cartons and containers used in packaging and for carrying plaintiff's beer bore one or more of the

slogans. These cartons and containers cost plaintiff approximately $9,000,000.00.

"In an effort to determine the effectiveness of the advertising program, plaintiff employed advertising surveys to determine whether the public was acquainted with the plaintiff's slogans, and whether the public associated the slogans with plaintiff's product. The results of the surveys showed that a substantial portion of the public was not only acquainted and familiar with the slogans but also associated the slogans with Budweiser beer.

"The court finds that as a result of the wide dissemination of advertising employing the slogans, for the long period which plaintiff has used the slogans in advertising its product, that the public did, in fact, know the slogans, associated the slogans with the products, and associated plaintiff as the source of the advertising.

"The court also finds that the slogans which were placed upon the containers and cartons were sufficient to identify the product.

"Defendant is engaged in the manufacture and sale of a floor wax which contains an insecticide. The product is sold under the name of Freewax. It has heretofore been marketed primarily in the Southern part of the United States. Defendant had been using the slogan 'Life on Floors . . . Death on Bugs' to advertise its product.

"At the time that the idea to use 'Where there's life . . . there's Bugs' arose, defendant knew that plaintiff was using the slogans 'Where there's life . . . there's Bud' and 'Where there's life . . . there's Budweiser'.

"On July 7, 1960, defendant, after warnings by plaintiff not to use the slogan, advertised Free-

wax on television in the Tallahassee, Florida—Thomasville, Georgia area.

"The court finds from listening to the tapes, and from watching the film strips, that defendant's use of the slogan was confusingly similar to plaintiff's. This is not to say that the tunes or the words in the advertising were exactly the same, but from the rhythm, meter and the pictures which appeared at the time that the slogan was used, when taken as a whole, created the impression that defendant's advertising had some connection with the plaintiff or plaintiff's product. Some of defendant's film strips show drinking glasses being filled, people dancing, and a simultaneous use of the slogan 'Where there's life . . . there's Bugs'. These films follow a format which plaintiff had employed for some four years. The court finds that the advertising of defendant is deceptively similar, so as to confuse the advertising of plaintiff and defendant.

"The court also finds that the value and effectiveness of plaintiff's prior advertising is impaired to some extent by the deceptively similar phraseology and treatment employed by defendant in its advertising. Unless enjoined, there is sufficient likelihood to damage to plaintiff, despite the fact that the court finds that no recompensable damages were incurred by plaintiff.

"The goods of plaintiff and the goods of defendant are not competitive, but the goods of plaintiff and defendant are sold at the same retail outlets and the association of bugs with Bud or Budweiser is sufficient to merit the apprehension that the ill repute of one type of goods is likely to be visited upon the other."

As the Court of Appeals stated, Petitioner has not at any time controverted any of the "significant" findings set forth above. (Petitioner's Appendix 54a)

REPLY TO QUESTIONS PRESENTED.

It would appear from a studied reading of Petitioner's brief that the alleged demanding questions presented for review boil down to jurisdiction, the Court's decision and application of the law to the merits of the case; and whether certain undefined questions should be certified to the Supreme Court of Florida. When these questions are stripped to their bare essentials it will be obvious that there are no questions to be reviewed by this Court under the ambit of Rule 19.

The Jurisdiction of the District Court Was Properly Predicated Upon Diversity of Citizenship and Amount or Value in Controversy, as Well as Upon the Lanham Act.

It is Petitioner's contention that this Court should review the unanimous decisions of the courts below because there was no jurisdiction since the amount in controversy was not in excess of Ten Thousand Dollars ($10,000.00). Furthermore, Petitioner asserts that the Supreme Court case of *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269, and the Seventh Circuit case of *Seven-Up Company* v. *Blue Note, Inc.*, 159 F. Supp. 248, aff'd. 260 F.2d 584 (C.A. 7, 1959) are in conflict with other decisions of other circuits relative to the determination of "the amount in controversy."

At the outset it must be brought to the attention of this Court that Petitioner, in its Answer to Respondent's Complaint, admitted diversity of citizenship and the amount in controversy. Specifically, Petitioner stated in its Answer:

> "The defendant (Petitioner) admits that this court has jurisdiction upon the ground of diversity of citizenship of the parties and the matter in controversy exclusive of interest and costs in the sum of Ten Thousand ($10,000.00) Dollars." (T. 328)

This jurisdictional question was not raised by Petitioner in the District Court or in the Court of Appeals until its Petition for Rehearing. It hardly behooves any of the lower courts to raise this belated question *sua sponte*.

Furthermore, the District Court made a specific finding that:

> "There is diversity of citizenship between the parties and the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs." (T. 787).

This finding is based and bottomed upon the fact that Petitioner's ineipient and projected course of conduct could and would affect and destroy Respondent's trademark and good will in which was spent in excess of Forty Million Dollars ($40,000,000.00) in advertising alone.

There is no conflict between this Court's decision in *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269 (1936), and the decisions of the various circuits, including the Fifth Circuit, as set forth on page 56 of Petitioner's brief. In the *KVOS* case plaintiff alleged that the amount in controversy exceeded Three Thousand Dollars ($3,000.00). This allegation was denied in a Motion to Dismiss because the complaint failed to set forth any facts to support the allegation that the amount in controversy exceeded Three Thousand Dollars ($3,000.00). Plaintiff, in reply thereto filed an affidavit which this Court stated was not sufficient to set forth facts supporting the jurisdictional amount. The Court stated:

"• • • Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill." (p. 279)

This is not the case in the present action. Respondent, in its complaint, specifically alleged facts in support of the amount in controversy, setting forth the fact that it has expended over Forty Million Dollars ($40,000,000.00) in advertising its slogan and trademark "Where there's life . . . there's Bud" (Paragraph 8, Complaint, T. 4). Respondent's complaint further averred that Petitioner's use of the slogan "Where there's life . . . there's bugs", was

". . . calculated and likely to and will dilute the good will created by plaintiff for its products as a result of plaintiff's slogan and trademark, and said continued use will impair the distinctiveness of said slogan and trademark as an identification of origin with plaintiff.

"Defendant, in promoting and selling its product in such an unlawful manner, calculates and is likely to and will have the effect of diluting, degrading and disparaging the products of plaintiff and will destroy the advertising theme and promotional efforts which plaintiff has built up over the years with the public as an identifying slogan and trademark for plaintiff's products." (Paragraphs 11, 12; T. 5).

Furthermore, the trial court, in granting Respondent a preliminary injunction, stated:

> "The court also finds that the value and effectiveness of plaintiff's prior advertising is impaired to some extent by the deceptively similar phraseology and treatment employed by defendant in its advertising." (T. 791).

The Court of Appeals, although it did not deal specifically with the question of the amount in controversy because this jurisdictional question was not raised by Petitioner in its appeal, nonetheless stated:

> "The gist of this action is that the plaintiff has a property interest in the slogan, built up at great expense, and that it and its products are favorably known as a result of its use of this property right and that the defendant, with full knowledge of the right and with the purpose of appropriating some of the value engendered in the minds of the public by its use has used, and proposes further to make use of, a deceptively similar slogan in a manner that will bring direct financial loss to the plaintiff, both by reason of confusing the source of the defendant's product, and by reason of the peculiarly unwholesome association of ideas when the word 'bugs' was substituted in the slogan for the word 'Bud,' referring to a food product." (Petitioner's Appendix, 58a)

Again we must repeat that Petitioner never raised the question of jurisdiction of the court or of the amount in controversy until its Petition for Rehearing before the Court of Appeals and here in its Petition for a Writ of Certiorari.

To set aside all doubt that the jurisdictional finding by the courts below was correct and that it is not in conflict with the other case cited by defendant, we turn to

the case of *Seven-Up Company* v. *Blue Note, Inc.*, 159 F. Supp. 248 (affirmed on appeal). This case involved the alleged passing off as "Seven-Up" of another beverage in a single retail establishment, the Blue Note restaurant. In the *Seven-Up* case, obviously, the trademark or property right was threatened with only a localized minor injury and not with destruction. In the present case, the Petitioner was about to embark on a nationwide advertising program and the evidence is clear from the testimony of the witnesses that the slogan "Where there's life . . . there's bugs" would impair and destroy Respondent's trademark and valuable good will throughout the United States. Both the District Court and the Court of Appeals made such findings, as set forth above.

There is, therefore, no conflict between this Court in the *KVOS* case and the *"Seven Up"* with other circuits as to a proper determination of the amount in controversy and it is obvious that Respondent in this regard has alleged and proved an amount in controversy in excess of Ten Thousand Dollars ($10,000.00).

Petitioner also alleged that there was no jurisdiction in this matter under the Lanham Act (the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.*). The trial court held that jurisdiction was not based upon the Lanham Act because Respondent obtained its United States Trademark registration for "Where there's life . . . there's Bud," after Petitioner had been preliminarily enjoined, even though the registration issued about a month before the trial on the merits. Nonetheless, the trial court based its jurisdiction on the diversity of citizenship and the amount in controversy and enjoined Petitioner based on the common law and the law of Florida.

Respondent on appeal assigned as error this ruling of the trial court. The Court of Appeals, in order to answer all questions and assignments of error presented to it,

found that jurisdiction also attached under the Lanham Act. However, the Court of Appeals' decision (as was the trial court's) was based upon Respondent's right to an injunction under the common law and the law of Florida. Consequently, the alleged question presented by Petitioner that the Lanham Act should not have been applied is at best a theoretical question presented, inasmuch as the decision of the trial court and the Court of Appeals was not based upon federal law required under the Lanham Act.

It is submitted, however, that the Court of Appeals' decision is eminently sound. The Lanham Act states:

> "Any person who shall, in commerce * * * (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy or colorable imitation, to labels, signs, prints, packages, wrappers, receptacles, or *advertisements intended to be used* upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by registrant * * *." (Emphasis ours) (15 USC 1114(1)).

Thus, the Lanham Act contemplates the bringing of an action for *intended infringing use*. Therefore, whenever a federal registration issues, the complaining party in a suit in equity can bring in and claim the benefit of the Lanham Act at the time of trial, based upon the federal registration. The complaining party need not wait until actual acts of infringement have been committed. This is consistent with law prior to the Lanham Act. *R. H. Macy & Co., Inc.* v. *Colorado Clothing Mfg. Co.*, 68 F.2d 690 (C.A. 10, 1934); *Standard Oil Co. of New Mexico* v. *Standard Oil Co. of California*, 56 F.2d 973, 976 (C.A. 10, 1932).

The Courts Below Applied the Proper Law in Finding Petitioner's Slogan "Where There's Life . . . There's Bugs" to Be an Infringement of "Where There's Life . . . There's Bud", as Well as to Constitute Unfair Competition by Petitioner.

The question presented by Petitioner to this Court in this respect is merely whether the courts below properly decided the case on the undisputed facts. In other words Petitioner is simply trying to retry the case in its entirety, although it does not point to any specific cases which are contrary to the decision of the Court of Appeals below.

The thrust of Petitioner's argument is that since the goods of Petitioner and Respondent are not in direct competition there can be no infringement or unfair competition. To support this contention Petitioner extracts various statements from Florida state law cases as well as cases from the Fifth Circuit Court of Appeals which are wholly distinguishable upon their factual background. Petitioner would have this Court believe that the courts below predicated their decisions wholly upon the "dilution" and "free ride" theory. That this is not so is clearly apparent from reading the decision of the Court of Appeals.

As the Court of Appeals stated:

> "The main thrust of the appellant's argument in this Court is that the absence of direct competition between Anheuser-Busch and Chemical Corporation of America in the sale by the former of beer and the sale by the latter of floor wax, prevents a court of equity, applying Florida law, from enjoining a deceptively similar slogan used by the latter in the sale of its products, notwithstanding the finding of the trial court that the adoption of the 'bugs' slogan

was with knowledge of the 'Bud' slogan, and that the use of the 'bugs' slogan would cause confusion in the minds of the public as to the source of the floor wax product and would damage the 'public image' of the appellee by associating in the minds of the public the idea of bugs with a food product." (Petitioner's App. 55a-56a)

The Court of Appeals then thoroughly reviewed the Florida cases upon which Petitioner predicated its argument. The Court of Appeals concluded its thorough review by stating:

"These cases make it clear that in Florida a cause of action may exist where simulation of another's name or slogan causes damage on grounds entirely separate from actual confusion between competitors as to the source of the product. For the further proposition that the concept of competition with respect to the particular product need not exist to warrant actions of this kind, see *Tampa Cigar Co., Inc.* v. *John Walker & Sons,* 5 Cir., 222 F. 2d 460 (an action brought for trademark infringement and also for unfair competition), and *Pure Foods, Inc.* v. *Minute Maid Corp.*, 5 Cir., 214 F. 2d 792, cert. denied 348 U. S. 888 (a Florida Lanham Act case).

This Court has held in *Creamette Co.* v. *Conlon, et al,* 5 Cir., 191 F. 2d 108, that 'the law of that state [Florida] applicable to claims of and protection from unfair competition are to the same effect as those prevailing in American jurisprudence generally.' Our research indicates that this is as true today as it was when that decision was written in 1951. We think, therefore, that the trial court properly construed the facts in this case as coming within the Restatement of the Law of Torts, Vol. III, Section 730, pp. 597, 598. Section 731, where it is stated:

'One's interest in a trademark or tradename came to be protected against simulation, . . .

> not only on competing goods, but on goods so related in the market to those on which the trademark or trade name is used that the good or ill repute of the one type of goods is likely to be visited upon the other. Thus one's interest in a trademark or trade name is protected against being subjected to the hazards of another's business.'" (Petitioner's App. 59a-60a)

The insidious effort by Petitioner to capitalize upon the good will and favorable impression Respondent had built up in its slogan for its products and for itself was properly characterized by the Court of Appeals as follows:

> "This is a brazen and cheap effort by the defendant below to capitalize on the good will created by the tremendous expenditure in advertising by the plaintiff." (Petitioner's App. 60a, 61a).

The Court of Appeals went on to say:

> "Finding, as we do, the liberal trend in the equity courts of the state of Florida towards the protection of trade names and slogans from unfair attacks by others, we are not reluctant to conclude that what is morally reprehensible is also legally impermissible. We conclude that the trial court was fully authorized in the entering of the final injunction against the continuing of such unfair practices by the appellant." (Petitioner's App. 61a)

Nowhere in the Court of Appeals' decision is there any use of the words or theory "free ride" or "dilution". The decisions of the courts below are clearly bottomed upon the powers of the court of equity to enjoin what is obviously an unfair business practice. As the trial court stated, "It was the basic unfairness in the commercial world of which this court took cognizance" (Pet's. App. 43a) Consequently, there is no need to delve into

the theoretical arguments of Petitioner with respect to "free ride" or "dilution" and their applicability to the laws of the State of Florida.

The myriad of immaterial propositions thrown out by Petitioner, such as that Respondent is endeavoring to monopolize "Where there's life . . . there's .....", do not apply. The question presented for the Court to determine was whether Petitioner was guilty of infringing upon Respondent's slogan "Where there's life . . . there's Bud" when it used "Where there's life . . . there's bugs" in advertising its products.

Similarly, the fact that the trial court found that Respondent was not entitled to any recompensable damages, is of no legal or material significance to the question presented herein because Respondent was fortunate enough to preliminarily enjoin Petitioner shortly after it began its advertising of the offending slogan in interstate commerce, which Petitioner threatened to use throughout the country. Petitioner's argument in this regard does not offer any special and important reason why this Court should grant a writ of certiorari. Rather, Petitioner is rearguing and reiterating the same legal theories it propounded to the two courts below.

Petitioner also mildly urges this Court that error was committed by the District Court and the Court of Appeals in enjoining the Petitioner from giving publicity or issuing press releases to this lawsuit. As the Court of Appeals stated, the trial court was merely entering an order to make effective the injunctive provisions of unfair competition and to prevent further occurrences of garbled, misleading, and erroneous statements issued to the public by Petitioner. *Gardner Sign Co.* v. *Claude Neon Lights, Inc.*, 36 F.2d 827 (D.C. Penn., 1929); *Price-Hollister Co.* v. *Warfield Corp.*, 18 F.2d 129 (D.C., N.Y., 1926).

There Was No Error By The Court Of Appeals In Refusing To Certify Any Question To The Supreme Court of Florida.

This four page question* presented by Petitioner is merely a belated effort and afterthought to find some ground to compel this Court to issue the writ of certiorari. This question was first presented to the Court of Appeals in its Petition for Rehearing. It had never been presented to or argued before the District Court or the Court of Appeals at the initial hearings or in briefs.

We find no argument with the fact that where there are unresolved state law questions, it may be proper to certify such questions to the Supreme Court of that state for appropriate disposition. This was done by this Court in *Clay* v. *Sun Insurance Office Limited,* 363 U.S. 207 (1960), where the case was remanded to the Florida Supreme Court to construe one of its statutes.

Similarly, the Fifth Circuit Court of Appeals in *Green* v. *American Tobacco Company,* 304 F.2d 70 (C.A. 5, 1962), certified to the Florida Supreme Court certain questions to determine whether, under the law of Florida, a manufacturer and distributor of cigarettes has absolute liability for death caused by using such cigarettes. In that case the Court stated:

> "In view of the importance of the question, and in especial consideration of the fact that one of the Judges of this Court dissented from this Court's disposition of that question on original hearing, and that the Judges of this Court, on petition for rehearing, remain of the same views as expressed in their opinions on original hearing, this Court has decided to grant the petition for rehearing to the extent necessary to certify such question or propo-

* Petitioner's Brief, pp. 40-43.

> sition of the laws of Florida to the Supreme Court of Florida, • • • (p. 86).

The Fifth Circuit Court of Appeals was fully aware of the procedure of certifying questions of import to the Supreme Court of Florida. Obviously, the present trademark and unfair competition case presented no new, novel, special, or important question which should be certified to the Florida Supreme Court for appropriate answer or disposition. As the Court of Appeals stated in *Creamette Co.* v. *Conlin et al,* 191 F.2d 108 (C.A. 5, 1951):

> "• • • the law of that State (Florida) applicable to claims of, and protection from, unfair competition are to the same effect as those prevailing in American jurisprudence generally."

Furthermore, the Court of Appeals below stated in this case:

> "Our research indicates that this is as true today as it was when that decision (*Creamette* case) was written in 1951." (Petitioner's App. 68).

Since the Court of Appeals saw no special or compelling reason to certify any question to the Supreme Court of Florida, it is submitted that this Court should not grant Petitioner's Petition for a Writ of Certiorari on this ground.

CONCLUSION.

The present litigation is of significance only to the litigants herein. It is not of such general importance and gravity as to justify review by this Court. Petitioner's brief shows no error in the judgment sought to be reviewed. The case involves questions of fact and conclusions of law upon which the two courts below have unanimously agreed. The judgment does not conflict with the decisions of this Court or of other Courts of Appeal and there is no special or important reason for granting the writ of certiorari.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Respondent's Brief has been forwarded by mail, postage prepaid, to Julius F. Parker, Esq., Brock Building, P.O. Box 669, Tallahassee, Florida, to Houston White and to Beryl H. Weiner, 309 Grant Building, Atlanta 3, Georgia, attorneys for Petitioner, this ..... day of March, 1963.

.....

OWEN J. OOMS